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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1944.

Nos. **405 - 406**

IN THE MATTER OF

PEER MANOR BUILDING CORPORATION,

Debtor.

J. MARSHALL PEER AND W. D. WITTER,

*Petitioners,*

*vs.*

G. J. NIKOLAS, G. J. NIKOLAS & COMPANY, INC.,  
AND HARRY FOOTE, ET AL.,

*Respondents.*

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIR-  
CUIT AND BRIEF IN SUPPORT THEREOF.

MEYER ABRAMS,  
HAROLD J. GREEN,  
MAURICE H. KAMM,  
*Counsel for Petitioners.*



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UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT AND BRIEF IN SUP-  
PORT THEREOF.**

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PETITIONS FOR WRITS OF CERTIORARI.

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Now come D. W. Witter and J. Marshall Peer, appellees in Cases No. 8468 and 8475, consolidated by the opinion of the United States Circuit of Appeals for the Seventh Circuit, and pray for the issuance of Writs of Certiorari to review the judgments entered on June 14, 1944, affirming the order of the District Court in Case No. 8468 and re-

versing and modifying, in part, the order in Case No. 8475 to the end that the judgments may be reviewed by this Court.

### **Statement of the Matter Involved.**

After the filing of the mandate of the United States Circuit Court of Appeals directing the District Court to dismiss the reorganization proceedings of the debtor under Chapter X for want of jurisdiction (134 F. (2) 839) the District Court allowed \$4325.00 in fees to the trustee whose appointment was annulled by the Court of Appeals, to be deducted from the funds which he collected while acting as trustee for the debtor, and taxed these items as costs against the petitioning creditors, to be refunded to the Indenture Trustee, when and if collected. Instead of dismissing the proceedings pursuant to the mandate which was filed June 28, 1943, the District Court assumed jurisdiction of the petition of the trustee relating to rents to be collected subsequent to the date of the filing of the mandate. Thereafter, the District Court directed that petitioner J. Marshall Peer turn over to the trustee \$7,033.40 which Peer collected in July and August, 1943 when the trustee was no longer in existence.

The Court of Appeals reversed that part of the order which taxed the \$4,325.00 against the petitioning creditors and taxed it against the fund. It affirmed the order directing Peer to turn over the \$7,033.40 to the trustee and the assignment of the claim to the Indenture Trustee. The Court of Appeals held that while its mandate directed the District Court to dismiss the proceeding for want of jurisdiction, it did not intend to deprive the District Court of jurisdiction to make allowances to its trustee and his counsel as compensation and to distribute the funds, and that it had the right to change its mandate on the second appeal.

### The Important Facts.

The Court of Appeals for the Seventh Circuit, after deciding that a corporation dissolved for over two years could not be reorganized as a corporation under Chapter X (134 F. (2) 839) and after the denial of certiorari by this court (320 U. S. 211), issued its mandate which was filed in the District Court on June 28, 1943, reversing the order appointing the trustee and directing the District Court to dismiss the petition for lack of jurisdiction (R. 3). Instead of carrying out this mandate as directed, the District Court assumed jurisdiction of the petition of the trustee (whose appointment was thus reversed) presented to it on July 9, 1943 seeking further collections of the income from the premises, in violation of the mandate. Petitioner Witter moved at the same time for an order of dismissal pursuant to the mandate (R. 6), and the other Petitioner Peer, filed an answer denying the jurisdiction of the District Court of the subject matter of the petition (R. 7-8).

On July 22, 1943 the District Court entered an order pursuant to the mandate, dismissing the reorganization proceedings for want of jurisdiction (R. 9). Instead of stopping there, the Court assumed further jurisdiction of the trustee's petition and continued the hearing thereon to August 25, 1943. It, at the same time, ordered the trustee, whose appointment was reversed, to proceed with the collection of the future rent of the debtor's property (R. 9). On August 25, 1943 it ordered Peer to turn over to the non-existent trustee \$7,033.40 which Peer collected *after* the filing of the mandate, in July and August, 1943 (R. 11). On September 21, 1943 the District Court allowed \$2,500.00 in fees to the trustee and \$1,750.00 to its counsel and \$74.00 for the printing of the brief, to be deducted from the rents collected, and to assign the claim

against Peer to the indenture trustee (R. 15). Thereafter, on September 23, 1943, it entered a further order taxing the fees allowed to its trustee and its counsel against the petitioning creditors (R. 43-44).

### **The Questions Presented.**

1. May a Bankruptcy Court compensate its appointed trustee and his counsel after the reversal of the order appointing the trustee for lack of jurisdiction of the parties and the subject matter?

2. May a Bankruptcy Court assume jurisdiction of a petition by its trustee to authorize him to collect future rents from the premises sought to be reorganized, and to direct the tenants to pay such rents to the trustee when the appointment of the trustee was annulled by the Court of Appeals for the lack of jurisdiction on the part of the court making the appointment and when its mandate was filed prior thereto?

3. Whether a Reviewing Court which had issued its mandate reversing the appointment of a bankruptcy trustee, and which instructed the District Court to dismiss the proceedings for lack of jurisdiction, had the power a year later to alter or amend its mandate so as to sustain an order of the District Court entered after the filing of its mandate and inconsistent therewith, because it appeared a year later to the Court of Appeals that if the matter had been presented to it its mandate would have been different.

4. In a case where petitioning creditors wrongfully invoked the jurisdiction of the Bankruptcy Court and procured the appointment of a trustee who entered upon possession of the property and collected the rent issues and profits and when such appointment was reversed for complete lack of jurisdiction of the subject matter of the parties, and where the District Court after the filing of the

mandate to dismiss the proceedings for lack of jurisdiction taxed the costs against the petitioning creditor, was it proper for the Court of Appeals to reverse such an order and to tax the costs against the fund collected and thereby charge the persons of whom the court had no jurisdiction with the cost for the wrongful seizure of their property?

5. Whether the District Court had jurisdiction to direct Peer to turn over the fund to the non-existent trustee, notwithstanding that he claimed to have collected all rents for the equity owner after the reversal of the order appointing the trustee.

### **Reasons for the Allowance of the Writ.**

The following are the reasons for the allowance of the writ:

1. The Circuit Court of Appeals has decided an important federal question in conflict with applicable decisions of this court and of other circuits, in that it held:

(a) That a Bankruptcy Court whose appointment of a trustee was reversed for lack of jurisdiction of the subject matter and of the parties, may thereafter allow compensation to such trustee and his counsel and to tax same against the fund and not against the parties who wrongfully invoked the jurisdiction.

(b) In holding that a Bankruptcy Court may disregard the mandate of the Reviewing Court directing it to dismiss the bankruptcy proceedings for want of jurisdiction, and to proceed thereafter to authorize the bankruptcy trustee, whose appointment was annulled by the mandate of the Court of Appeals, to continue to manage and operate the property after the filing of the mandate, and sustaining such order on the theory that the Court of Appeals had the right to change and alter its mandate.

2. The decision of the Circuit Court of Appeals that it may alter or modify its mandate after the expiration of the term of the issuance of its mandate and the denial

of certiorari, upon a second appeal from the order which clearly violated the mandate, is in conflict with universal law relating to appellate procedure.

3. The questions presented are of great public interest and involve the construction of federal administration concerning bankruptcy and other equitable proceedings, in that:

(a) Where parties wrongfully invoke the jurisdiction of a court and obtain the seizure of the property through a bankruptcy trustee and it is later adjudicated that such seizure was without jurisdiction of the parties and the subject matter, the taxing of the expense against the funds collected deprives such parties of their property without due process of law in violation of the Fifth amendment to the Constitution.

(b) To permit a trial court to violate a mandate which annulled the appointment of its trustee and to authorize such a trustee, after the filing of the mandate, to continue to perform active duties, destroys the entire system of law and is contrary to elementary principles of duties of courts to comply with the mandates of the appellate court.

(c) The action of the Reviewing Court almost a year after it had issued its mandate and after the denial of certiorari in approving the orders of the trial court on the ground that the Court of Appeals could itself modify its mandate, is contrary to all existing law and destroys the doctrine of the "law of the case," *res judicata* and the ending of litigation.

(d) To permit petitioning creditors to file involuntary proceedings in bankruptcy and to incur costs by the appointment of a trustee, and after the reversal of the appointment and the direction to dismiss the proceedings for want of jurisdiction to relieve such petitioning creditors from their responsibility by taxing same against the funds, encourages persons to wrongfully invoke the jurisdiction of the court without taking the risk of being held liable for their wrongful acts.

4. There is no precedent for the power of a District Court to order third parties to turn over funds which such parties claim adversely to a trustee whose appointment was annulled by the mandate of the Court of Appeals, and in a proceeding which was ordered dismissed for lack of jurisdiction.

**Prayer for Relief.**

Petitioners jointly and severally pray that these petitions for Writs of Certiorari may be granted and that upon a final hearing the judgments of the United States Circuit Court of Appeals for the Seventh Circuit be reversed in both cases, to the end that that part of the order of the District Court which taxed the costs against the petitioning creditors be sustained, and that the order directing Peer to turn over funds to the nonexistent trustees be reversed.

Respectfully submitted,

J. MARSHALL PEER and  
W. D. WITTER,

*Petitioners.*

By MEYER ABRAMS,  
HAROLD J. GREEN,  
MAURICE H. KAMM,  
*Attorneys for Petitioner.*

Chicago, Illinois,  
August 24, 1944.

**BRIEF IN SUPPORT OF PETITION.**

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**Opinions Below.**

The opinion of the Circuit Court of Appeals for the Seventh Circuit reversing the appointment of the trustee and instructing the dismissal of the proceedings by the Bankruptcy Court for want of jurisdiction is fully reported (134 F. (2) 839). Certiorari was denied here (820 U. S. 211). The opinion of the Seventh Circuit on the second appeal in the instant case is not yet reported and is printed in this record at Page 80.

**Jurisdiction Invoked.**

The judgment of the Circuit Court of Appeals for the Seventh Circuit affirming the judgment of the District Court in case No. 8468, was entered June 14, 1944 (R. 89). The judgment of the Circuit Court of Appeals modifying the judgment below, charging the administrative expenses to the fund and relieving the petitioning creditors from liability was also entered on the same day (R. 90). The petitions for rehearing were denied in both cases on June 29, 1944 (R. 107). The jurisdiction of this court is invoked under judicial code Section 240(a), 28 U. S. C. A. Section 347a as amended by the Act of February 13, 1925. The mandates were stayed during the pendency of this petition.

**A Statement of the Case.**

After the denial of certiorari by this court (320 U. S. 211) to review the decision of the United States Circuit Court of Appeals for the Seventh Circuit, which held that the District Court was without jurisdiction of the subject matter and of the parties (134 F. (2) 839), the mandate

of that court was filed June 28, 1943 and is as follows (R. 3):

“It is ordered, adjudged and decreed by this Court that the order or decree of the said District Court in this cause appealed from, be, and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said District Court with instructions to dismiss the petition for lack of jurisdiction.”

On July 9, 1943 Petitioner Witter moved to dismiss the proceedings pursuant to the mandate (R. 6). On the same day, Fred Hummel, the trustee whose appointment had been reversed, filed a petition (R. 5) seeking to collect from Peer rents collected by Peer for the month of July. Peer filed an answer (R. 7) denying that he was collecting as agent for Hummel, since the filing of the mandate ousting Hummel for lack of jurisdiction on the part of the court which appointed him, denying Hummel's rights to rents accruing after the mandate and stating that he was collecting as agent for the equity owners.

On July 22, 1943, the District Court entered an order (R. 9) dismissing the petition for reorganization pursuant to the mandate filed June 28, 1943. At the same time the Court set for hearing the petition of the trustee with respect to the rent collected by Peer, for August 25, 1943 and directed the trustee whose appointment was voided to collect all August rents and ordered the tenants to pay the rents to the trustee, to be held subject to the further order.

On July 28th, 1943, Peer moved (R. 10) to vacate all portions of the order of July 22, 1943, except the first paragraph which dismissed the proceedings according to the Mandate, on the ground that the court had no jurisdiction to hear the other matters. On August 25, 1943, the court entered an order (R. 11) reciting that Peer had collected \$7,033.40 from July 1 to August 21, 1943, and directed Peer

to turn the money over to the trustee to be held by him pending the order of the court as to the disposition of the funds.

The motion to vacate was continued several times and on September 21, 1943, the District Court entered an order which (R. 14) approved the trustee's reports, denied the motion of Peer to vacate portions of the order of July 22, 1943, fixed the compensation of Hummel as trustee at \$1,750.00 and that of his counsel at \$2,500.00, ordered any unpaid balance of these fees paid, and directed the federal trustee to turn over to the Heitman Trust Company, the debenture trustee, the balance of \$16,254.11 and to assign to said indenture trustee his claim against Peer, and discharged the trustee upon compliance with the order. The court expressly refused to make a finding as to the ultimate rights of any parties against the funds or chose in action.

On September 23, 1943 the District Court entered an order (R. 69) that the fees of Hummel and his counsel aggregating \$4,250.00 and the \$74.00 paid by Hummel to the unsuccessful petitioning creditors for printing briefs, or a total of \$4,325.00 be taxed as costs against the respondent, the petitioning creditors, G. J. Nickolas, G. J. Nickolas & Co. Inc. and Harry Foote, and judgment was entered against them, in favor of the Indenture Trustee, to be held "for the persons lawfully entitled thereto."

In Appeal No. 8468 to the Circuit Court of Appeals, Peer appealed from the order of September 21, denying his motion to vacate parts of the order of July 22, 1943, also from the turn over order of August 25, 1943, and from the order of September 21, 1943, approving the trustee's report and directing the trustee to pay himself and his counsel out of the funds then in his possession (R. 16). In Appeal No. 8475 Respondent Nickolas, *et al.*, appealed

from the order of September 23, 1943, taxing them with the trustee's and attorney's fees (R. 71). These two appeals were consolidated in one opinion rendered by the Circuit Court of Appeals on June 14, 1944 (R. 80).

The Circuit Court of Appeals affirmed the order of the District case on Appeal # 8468, saying that by its mandate on the previous appeal that the proceeding be dismissed for lack of jurisdiction it did not intend to prevent the District Court from awarding costs or disposing of the funds collected by the court's trustee; that if its mandate on the former appeal were to be construed to deny any jurisdiction to the District Court, it would correct its ruling in view of the facts concerning the moneys in the hands of the trustee.

In Appeal # 8475 the Circuit Court of Appeals modified the order of the District Court by eliminating the judgment against the petitioning creditors. It held contrary to its former opinion that the District Court was not wholly without jurisdiction; that the estate benefited by the services of the trustee and that the trustee and his counsel's fees were administrative charges to be paid out of funds on hand with the trustee.

In the petition for rehearing, it was pointed out that not only was the decision inconsistent with its decision on the prior appeal but that it had misconceived the facts in stating that the rents which Hummel sought to recover from Peer were collected by him before the filing of the mandate, as the rents were from July 1, 1943 to August 21, 1943 and the mandate was filed June 28, 1943. Rehearing was denied.

### **Specification of Errors Relied On.**

The United States Circuit Court of Appeals for the Seventh Circuit erred:

(1) In holding that where a trustee's appointment is reversed and the petition for reorganization ordered dismissed for lack of jurisdiction over person and subject matter, the District Court may charge the fees of the trustee and his counsel against the fund collected by the trustee.

(2) In holding that where the mandate orders the District Court to dismiss for lack of jurisdiction bankruptcy proceedings in which a trustee has been appointed, the District Court may, after the mandate has been filed, disregard the mandate, continue the trustee in possession to collect the rents, and enter orders against persons claiming adversely to the trustee with respect to rents accruing after the filing of the mandate.

(3) In holding that it may almost a year after its mandate has been filed, modify the mandate so as to authorize the District Court to pay fees to the trustee and his counsel out of rents collected, where in the opinion, pursuant to which the mandate was issued, the court had held the District Court lacked jurisdiction to appoint a trustee and where the only new facts presented on the second appeal is the amount of money in the hands of the trustee improperly appointed, and where the law has not changed since the first opinion was written.

(4) In holding that the District Court had no jurisdiction to appoint a trustee but had jurisdiction to order him to collect rents from adverse claimants and to pay himself and his counsel fees out of the rents collected by the trustee, when the persons to whom those rents might belong were not before the court.

(5) In holding that where the court had jurisdiction over the petitioning creditors and another creditor objecting to the bankruptcy petition, it had no right to enter judgment against petitioning creditors for the expenses of administration where the petitioning creditor had improperly, though not in bad faith, invoked the aid of the bankruptcy court and failed to confer jurisdiction over a debtor or of the subject matter of a reorganization.

(6) In affirming the orders of the District Court improperly made in Cause # 8068 and in reversing the correct judgment of the District Court in Cause # 8075.

## SUMMARY OF ARGUMENT.

## I.

**The District Court Was Without Jurisdiction to Allow \$4,325 in Fees to Its Trustee and His Counsel Subsequent to the Filing of the Mandate Reversing the Appointment of the Trustee for Lack of Jurisdiction of the Subject Matter and of the Parties, and It Was Without Power to Tax Such Expense Against the Fund.**

(a) The reversal of the order appointing the trustee had the same effect as though no trustee had ever been appointed.

(b) No fees may be allowed to a trustee in bankruptcy and his counsel where the appointment was reversed for lack of jurisdiction.

(c) The charge of the fees against the fund collected from property belonging to persons who were not before the court deprived them of their property without "due process" in violation of the Fifth Amendment to the United States Constitution.

(d) The mandate of the court required no interpretation and was binding upon the District Court as well as upon the Court of Appeals. The Court of Appeals had no right to modify its mandate upon the second appeal, because:

(1) No change of law or new facts intervened to bring the case within the rare exception of the Luminous Unit case cited by the court as justification for its action.

(2) The Luminous case doctrine has been cited by the Judge who wrote the instant opinion as authority

for the opposite proposition, that a District Court may not award damages where the mandate directs the dismissal for want of jurisdiction.

(e) The order taxing the costs and fees against the petitioning creditors was proper for:

(1) They wrongfully invoked the jurisdiction of the Federal Court and brought about the appointment of the trustee who seized the property.

(2) Restitution requires that the parties be made whole.

## II.

### **The Order Directing Peer to Turn Over to the Non-Existent Trustee \$7,003.40 Was Clearly Void and Based Upon a Misconception of the Facts and the Law.**

(a) The material facts were misconceived because the rents which the order directed turned over were those which had accrued for July and August, 1943, after the filing of the mandate. The Circuit Court referred to the rents collected as being those arising before the mandate.

(b) After the appointment of the trustee had been reversed, there was no trustee *in esse*, and Peer could not have been the agent for the non-existent trustee. The District Court had no jurisdiction to determine the disposition of funds collected by Peer after the filing of the mandate.

(c) The reversal of the order appointing the trustee placed the parties in the same position as though no trustee had ever been appointed and the trial court was without jurisdiction to direct the non-existent trustee to collect rents thereafter accruing.

(1) Even though the mandate was silent as to the disposition of the funds in the hands of the trustee, the mandate ordering the proceedings dismissed could

mean but one thing—that the trusteeship come to an end and the court take appropriate steps to terminate it and divest the trustee of money he then had on hand, not to attempt to collect new money.

(2) The opinion justifying the action of the District Court constitutes a modification of the mandate on the first appeal, which it was not permitted to do lest litigation be encouraged in the hope that upon a subsequent appeal a different result might be obtained.

(d) The mandate issued on the first appeal was binding on the Court of Appeals on the second appeal and it had no right to deviate from its mandate which was limited to the dismissal of the proceedings for want of jurisdiction.

(e) The reversal of the Appointment of the trustee ended the jurisdiction of the District Court as to future management of the property, the collection of rent, and the application thereof. It was the duty of the Court of Appeals to reverse the order which authorized the trustee to collect rents after the filing of the mandate, and the turn-over order was void for lack of jurisdiction.

## ARGUMENT.

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I.

The District Court was without jurisdiction to allow \$4,325 in fees to its trustee subsequent to the filing of the mandate reversing the appointment of the trustee for lack of jurisdiction of the subject matter and of the parties, and it was without power to tax such expense against the fund.

After the filing of the mandate on June 28, 1943 reversing the appointment of the trustee with instructions to dismiss the proceedings for want of jurisdiction, the District Court allowed to its trustee and his counsel on September 21, 1943 (R. 15) \$4,325.00 as compensation, to be paid to them out of the rents collected. On September 23, 1943, it taxed the \$4,325.00 against petitioning creditors (R. 69). The Court of Appeals reversed the latter order and sustained the former, all of which was clearly without jurisdiction and contrary to all decisions of this Court and other circuits.

In sustaining the payment of the \$4,325.00 out of the fund to the Trustee whose appointment was annulled, the court said that when it reversed the appointment for lack of jurisdiction it did not intend to prevent the District Court "from awarding costs" and the District Court "correctly construed the order as a direction to it to dismiss, but with reservation to it to adjudge costs and make an appropriate order disposing of funds which had been collected by its appointed trustee." It further said that the reasonableness of the allowance to the Trustee or to his attorney, or of the costs, was not questioned. Of course, the reasonableness was not questioned, because the

court taxed the costs against the petitioning creditors and there was no occasion for these petitioners to inquire into the reasonableness of the amount which was not taxed against the fund.

**(a) The reversal of the appointment operated as if no Trustee was ever appointed.**

The mandate of the court merely directed the District Court to dismiss the proceedings for want of jurisdiction. The court *reversed* the order appointing the Trustee for lack of jurisdiction. *This mandate of reversal of the appointment was self-executing.* The only power conferred on the court to enter orders was the dismissal of the proceedings for want of jurisdiction. *This was a ministerial act* (4 Cor. Jur., page 1234). The reversal was *not on the ground that there was error in the appointment but on the ground that there was a complete lack of jurisdiction.* The opinion of the court in reversing the appointment of the Trustee was on the ground that *there was no bankruptcy* of which the bankruptcy court had jurisdiction and, therefore, the court was without jurisdiction of the subject matter and of the parties. The court said in its former opinion (134 F. (2) 839):

“Jurisdiction of this new proceeding had to be worked out by having first an entity that could be sued, and second a corporation found to be in existence, since only corporations can be reorganized under Chapter X of the Bankruptcy Act, 11 U. S. C. A. Sec. 501, *et seq.*”

“As to the first essential element, the having of an entity that could be sued, the corporation having been dissolved for more than seven years prior to the commencement of the proceedings, it was nonexistent and dead for all legal purposes. It could neither sue nor be sued. The service of process upon it was an impossibility.”

The court also said:

"The purported appearance and answer of the former corporation by the attorneys were a nullity. The corporation had been dead for seven years, and was incapable of appointing attorneys or exercising any other corporate function. Since the court had no proper party before it and could not subpoena the defunct corporation, it was without jurisdiction to proceed."

It also said:

"For another reason the court was without jurisdiction to proceed, because the second essential element was lacking. It could not proceed under Chapter X of the Bankruptcy Act unless it had before it a corporation, as only corporations can be reorganized under this Chapter. This was a jurisdictional fact that did not exist and could not exist because the alleged debtor corporation was no longer *in esse*. There was no corporation to be reorganized."

Therefore the appointment was void *ab initio*.

**(b) No fees may be allowed to a bankruptcy Trustee upon the reversal of the appointment for want of jurisdiction.**

Where a court concludes that there was an utter lack of jurisdiction of the parties and the subject matter, the trial court can only dismiss the proceedings for want of jurisdiction and cannot make allowances to the Trustee and his counsel, who were appointed under the *void* order.

In *McRae v. Dodt*, 72 Pac. (2) 444, this question was discussed and the distinction between mere error in the entry of an order and lack of jurisdiction was pointed out. There the court said (p. 447):

"We know of *no case* which holds that one who performs service under an order of a court which lacks jurisdiction of the *res* is entitled to recover a fee for his services from the corpus of the estate involved.